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Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law

SIEL DEMEYERE*

Abstract: Multinational enterprises can go unpunished for acts, even amounting to human rights violations, that are committed in developing countries. Because the subsidiary has committed these acts, the mother company itself escapes liability. In this article, we will analyse how one can nevertheless react against acts of subsidiaries abroad. We will study the possibility of liability in tort and the grounds for piercing the corporate veil in French, Belgian, and English law. We then make a comparison with the economic unity argument in competition law. As these arguments are based on French, Belgian, and English law, we will first shortly discuss how the application of such laws can be ensured and how jurisdiction of courts within the EU can be established.

Résumé: Des entreprises multinationales peuvent rester impunies pour des actes, élevants à des violations des droits humains, qui sont commis dans des pays à développement. Parce que c'est la filiale qui a commis ces actes, la société mère elle-même n'est pas responsable. Dans cette contribution, on analyse comment on peut réagir contre des actes d'une filiale à l'étranger. On étudie la responsabilité extracontractuelle et les bases pour lever le voile social en droit français, belge et anglais. Après, on fait une comparaison avec l'argument d'unité économique en droit de concurrence. Comme tous ces arguments sont basés sur le droit français, belge et anglais, on discute d'abord brièvement comment on peut assurer qu'un de ces lois soit applicable et qu'un tribunal européen soit compétent.

Zusammenfassung: Multinationale Unternehmen werden regelmäßig nicht für Handlungen bestraft – selbst wenn es sich um Menschenrechtsverletzungen handelt – die in Entwicklungsländer begangen wurden. Weil eine Tochtergesellschaft diese Handlungen vorgenommen hat, entgeht der Mutterkonzern einer Haftung. Im vorliegenden Beitrag wird der Frage nachgegangen, wie man auf solche Handlungen von Tochtergesellschaften im Ausland rechtlich reagieren kann. Wir werden die Möglichkeit einer deliktsrechtlichen Haftung aufzeigen und die Gründe für eine Durchbrechung der Haftungsbegrenzung im französischen, belgischen und englischen Recht untersuchen. Wir werden dann einen Vergleich hinsichtlich des Argumentes der ökonomischen Einheit im Wettbewerbsrecht vornehmen. Da diese Argumente auf dem französischen, belgischen und englischen Recht beruhen, werden wir vorab untersuchen wie die Anwendung dieser Rechte gesichert und eine Zuständigkeit von Gerichten innerhalb der EU geschaffen werden kann.

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1. Introduction

Multinational enterprises (MNEs) set up corporate groups and benefit from these structures, often with a view to limiting liability for the practices of their subsidiaries. Especially when the subsidiaries are located in less developed countries, human rights violations and labour conditions bordering slavery can go unpunished.[1] The victims of these acts, who we will also call 'involuntary creditors', are mostly employees of the subsidiary and local population of the host country. Because of this impunity, they should attempt to establish the liability of the mother company, assumingly domiciled within the EU, in order to ensure a fair handling of their case and the application of a full-fledged body of law. Although this might be decried as forum shopping, the mother companies eventually benefit from the corporate structure they set up, so it is logical to (try to) hold them liable. Moreover, the mother companies definitely go forum shopping when they choose a country to set up a subsidiary, so why should the victims of these practices not be allowed to do the same?

The globalization and emergence of MNEs have urged the need to contain the practices of these companies.[2] However, little attention has gone to the inability of European countries to ensure the respect for human rights and the environment by MNEs that have a link with Europe.[3] Recently, several international and supranational organizations, such as the EU, the Council of Europe, the International Labour Organization (ILO) and the UN, have attempted to take corporate social responsibility to a higher level,[4] although none of their

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1 See extensively, on the problem of impunity, O. De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law', in *Non-State Actors and Human Rights*, ed. P. Alston (Oxford: Oxford University Press 2005), pp 227-314.

2 See, for instance, the following recent case on the alleged slavery organized by prawn fishing companies: K. Hodal, C. Kelly & F. Lawrence, 'Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK', 10 Jun. 2014, http://www.theguardian.com/global-development/2014/jun/10/supermarket-prawns-thailand-produced-slave-labour (consulted on 15 Jun. 2014).

3 Despite the attention that the *Institut de Droit International* tried to draw to this problem in 1995 already. See Institut de Droit international, 'Obligations of Multinational Enterprises and their Member Companies', 1 Sep. 1995, http://www.idi-iil.org/idiE/navig_chon1993.html.

4 Resolution of European Parliament No. 2013/2638(RSP) on labour conditions and health and safety standards following the recent factory fires and building collapse in Bangladesh; Resolution of the European Parliament COM (2001) 366 on the Commission Green Paper on promoting a European framework for corporate social responsibility; Steering Committee for Human Rights, Preliminary Draft Declaration of the Committee of Ministers on the United Nations Guiding Principles on Business and Human Rights (CDDH(2013)014), 30 May 2013; Tripartite Declaration of the International Labour Organization of principles concerning multinational enterprises and social policy (MNE Declaration), 4th edn, 1 Jan. 2006; J. Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises – Guiding Principles on Business and Human Rights:*

instruments are binding upon countries or companies.[5] Still, no country is willing to assume jurisdiction over corporate social responsibility (CSR) cases or to enact a victim friendly substantive law. Nothing seems to prevent the MNEs from using the limitation of their liability as a source of profits.[6]

We will study what possibilities there are under current English, French, and Belgian laws to hold a mother company, domiciled in the EU, liable for the acts of its subsidiary. The need to establish liability of the mother company will be most urgent in case of a non-EU subsidiary, established in a country without a full-fledged and good-working body of law.[7] Lastly, we will look at the concept of undertaking in competition law. Of course, this law will not be of direct help to the claimants we envisage, but it is worth to be discussed because of the interest it attaches to corporate groups and the similarities between victims of practices of subsidiaries and victims of competition law violations.

Limited liability was initially set up to protect the natural persons behind the company.[8] This *ratio* has no relevance in a company group where only companies, and no natural persons, are behind a subsidiary. Setting up a subsidiary often does not involve a new risky investment but is a mere restructuring of existing activities.[9] It is likely that in a corporate group, the interest of certain companies will be subordinate to the well-being of the whole

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Implementing the United Nations 'Protect, Respect and Remedy' Framework, 21 Mar. 2011, http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples.

5 See, on several of these instruments, R. MULLERAT (ed.), *Corporate Social Responsibility – The Corporate Governance of the 21st Century* (Alphen aan den Rijn: Wolters Kluwer 2011).

6 V. THOMAS, 'La responsabilité de la société mère pour faute dans l'exercice du pouvoir de contrôle de la filiale', *Rev. Proc. Coll. (Revue des Procédures Collectives)* 2013, nr. 6, dossier 55, nr. 3. In England, there is even said to be 'a historic tendency for companies to take advantage of the concept of separate corporate liability in order to arrange their group affairs so as to compartmentalise liabilities'. See P. HUGHES, 'Competition Law Enforcement and Corporate Group Liability – Adjusting the Veil', *ECLR (European Competition Law Review)* 2014, p (68) 80.

7 The deficiencies in the law can be due to the inability to develop a good-working law, e.g., because of other priorities, such as the satisfaction of primary needs. We can, for instance, think of access to water and the fight against plagues. The local authorities might not only be unable but also unwilling to address these problems because of their courtesy towards MNEs or even their corruptness.

8 C.M. BRÜLS, 'Quelques réflexions juridiques et économique sur la théorie de la levée du voile social', *RPS (Revue Pratique des Sociétés Civiles et Commerciales)* 2004, p (303) 314; P. HUGHES, 35(2). *ECLR* 2014, p 75; P. MUCHLINSKI, 'The Company Law Review and Multinational Corporate Groups', in *The Reform of United Kingdom Company Law*, ed. J. de Lacy (London: Cavendish Publishing Ltd 2002), p 266.

9 P. MUCHLINSKI, 'Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases', *ICLQ (International and Comparative Law Quarterly)* 2001, p (1) 16, nr. 50.

group. Then, it is not *per se* logical to respect the separateness of the legal persons.[10] Especially when the subsidiary is wholly owned by the mother company, it is arguable that the subsidiary's activities should engage the mother's liability.[11]

We will therefore study the different ways to hold a mother company liable for acts of its subsidiary, except for liability based on insolvency. This immediately makes one think of the possibilities to pierce the corporate veil. Veil piercing occurs when 'the separateness of a corporation [is disregarded] and the shareholders [are held] liable for the corporation's actions as if it were the shareholder's own'.[12] We will refer to all ways of veil piercing as 'indirect liability of the mother company' because the liability of the mother company is established through a debt of its subsidiary. However, a mother company can be liable for its own deeds or omissions too. In the latter situation, the corporate veil is crossed, not pierced,[13] and we will refer to this situation as one of 'direct liability of the mother company'.

A study of English, French, and Belgian law only makes sense when the applicability of one of these laws can be ensured, despite the international nature of the case. In case of indirect liability, a rather complicated conflict of law question arises.[14] This has often led the courts to negate this question and apply the *lex fori*, i.e., the law of the country where the case is tried, to the entire case.[15] In case of direct liability, English, French, or Belgian law can be applied

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10 B. Grimonprez, 'Pour une responsabilité des sociétés mères du fait de leurs filiales', *Rev. Soc. (Revue des Sociétés)* 2009, p 715, nr. 4.

11 In such a case, the subsidiary is said to be 'bound hand and foot to the parent company and must do just what the parent company says'. See *Adams* v. *Cape Industries Plc* [1990] Ch. 433, at 534C citing Professor Gower, *Modern Company Law* (3rd edn, 1969), p 216.

12 C.M. Brüls, *RPS* 2004, p 303; V. Simonart, *La personnalité morale en droit privé comparé* (Brussels: Bruylant 1995), p 457; K. Vandekerckhove, *Piercing the Corporate Veil* (Alphen aan den Rijn: Kluwer Law International 2007), p 1.

13 A. Sanger, 'Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary', *CLJ (Consumer Law Journal)* 2012, nr. 71(3), pp 478–481.

14 The case can be characterized in view of the claim against the subsidiary or in view of the veil piercing issue. Because of these two possibilities, *dépeçage*, i.e., 'the application of the laws of different states to different issues in the same case', could be allowed. See S.C. Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity', *Am. J. Comp. L. (American Journal of Comparative Law)* 2011, p (173) 185. Moreover, the national laws have no clear rule for the law applicable to veil piercing cases. One can argue for the application of the *lex fori*, the *lex societatis* of the subsidiary or the *lex societatis* of the mother company.

15 K. Vandekerckhove, *Piercing the Corporate Veil*, p 611. In these English, French, and Belgian cases for instance, there was no consideration as to the applicable law at all: Court of Appeal (Civil Division) 27 Jul. 1989, *Adams* v. *Cape Industries Plc* [1990] Ch. 433; Cass. fr. (Com.) 22 Jun. 2009, nr. 98-13.611, http://www.legifrance.gouv.fr/; Court of Appeal Versailles (Chamber 12) 14 Feb. 1991, *De Kluguenau* v. *Ouizille*, www.lexisnexis.com; Court of Appeal (Chamber 2) Aix-en-Provence 18 Nov. 1993, *Société de droit libanais Mohamed Zoatai and Bros* v. *SA Lemphy*

through Articles 7 and 17 of the Rome II Regulation. Article 7 enables the application of the *lex loci delicti commissi* in case of environmental damage.[16] The application of the *lex loci delicti commissi* will only help us if the decisions that were taken by the mother company can be taken into account and not only the behaviour of the subsidiary. Dickinson defines the event giving rise to damage as 'the event for which the defendant is responsible, whether or not it consists of his own act or omission'.[17] It is acknowledged that several material events or causes can give rise to the damage. Several *loci delicti commissi* are thus possible. Otero argues that the best choice would be for the law of the place where the most substantial event occurred.[18]

Article 17 states that the rules of safety and conduct of the place and time of the event giving rise to the damage should be *taken into account*. Although this is less stringent than that they should be applied, the broad interpretation of Article 17 ensures that that law can determine the liability of the mother company for a great part.[19] When Article 7 or 17 is not relevant to the conflict of law issue, the applicability of English, French, or Belgian law may be ensured by way of the public policy exception. In case the application of a foreign law would be contrary to the public order in which the case is tried, the *lex fori* can be applied anyway on the basis of the public policy exception.[20] This exception is only rarely accepted,[21] but it may be argued that it is an element of the public order of a civilized country to hold a mother company liable for the unacceptable behaviour of its subsidiary.

Maritima Entreprise, www.lexisnexis.com; Court of Appeal Antwerp 1 Feb. 1994, *TRV (Tijdschrift voor rechtspersoon en vennootschap)* 1996, p 64; Court of Appeal Antwerp 12 Dec. 1995, *TRV* 1996, p 62; Cass. be. 6 Dec. 1996, C.950260.N, www.cass.be. In these English cases, the court considered the law to be applied to one issue at stake but did not redo its reasoning for the veil piercing issue: Queen's Bench Division (Commercial Court) 25 Feb. 2011, *Antonio Gramsci Shipping Corp* v. *Stepanovs* [2011] EWHC 333 (Comm); Supreme Court 6 Feb. 2013, *VTB Capital Plc* v. *Nutritek International Corpn and others* [2013] UKSC 5.

16 For Art. 7 to apply, the consequence of the event giving rise to damage must be analysed as environmental, not the event giving rise to damage itself. A. Dickinson, *The Rome II Regulation* (Oxford: Oxford University Press 2008), p 437.

17 *Ibid.*, p 439.

18 C. Otero Garcia-Castrillon, 'International Litigation Trends in Environmental Liability: A European Union – United States Comparative Perspective', *Journal of Private International Law* 2011, p (551) 570.

19 A. Dickinson, *The Rome II Regulation*, p 640.

20 For the public policy exception in the Rome I and II Regulations, see Art. 21 Rome I Regulation and Art. 26 Rome II Regulation. For French law, see, e.g., Cass. fr. (1st Civ.) 25 Jan. 1977, nr. 74-13437, *Bull. Civ. (Bulletin Civil)* 1977, I, nr. 43; Cass. fr. (1st Civ.) 24 Feb. 1998, *D. (Dalloz)* 1999, somm. 290. For Belgian law, see Art. 21 of the Belgian Code on Private International Law. For English law, see L. Collins (ed.), *Dicey, Morris and Collins on the Conflict of Laws*, II (London: Sweet & Maxwell 2006), p 1626.

21 Recital 37 Rome I and Recital 32 Rome II; ECJ 28 Mar. 2000, C-7/98, *Krombach* v. *Bamberski*.

Establishing the jurisdiction of an EU court is less complicated.[22] A claim against a company domiciled within the EU can, according to (new) Article 4 of the Brussels I Regulation, be brought in the country of that domicile.[23] The subsidiary can be involved in the proceedings in that country as the claim against the subsidiary is connected with the claim against the mother company and can thus be decided upon by the same court.[24]

We will only discuss the situation of a subsidiary and its mother company. However, the influence of an MNE on a supplier might be similar to the power that a mother company has over its subsidiary. Especially when one MNE is the sole client of the supplier and when the supplier is situated in a less developed country, abuses by the MNE are easy. Fairly recently, the Dhaka drama has again brought to light what dramatic consequences poor working situations can have.[25] It will be harder to establish the liability of the mother company for a supplier than for a subsidiary. However, when the companies have a long business relationship and even more so when the MNE has a code of conduct,[26] it might be possible to hold the MNE responsible for the activities of its supplier.

We will study the liability of a mother company for its subsidiary, but we will assume that the mother company is not formally appointed as director of its subsidiary. Due to its influence, however, the mother company might be a *de facto* director or shadow director (cf. *infra* 3.2, Vicarious Liability for these concepts in English law). We will not thoroughly look into director's liability. We also assume that neither the mother company nor the subsidiary is at the verge of insolvency. We will accordingly not consider the financial grounds for piercing the corporate veil, such as undercapitalization, asset stripping, and unduly

22 In the United States, claimants try to establish jurisdiction based on the Alien Torts Statute. This century-old statute has recently drawn a lot of attention but tends to be interpreted restrictively. See, e.g., *Sosa* v. *Alvarez Machain*, 542 U.S. 692 (2004); *Kiobel* v. *Royal Dutch Petro. Co*., 133 S.Ct. 1659 (2013); *Daimler AG* v. *Bauman*, 134 S.Ct. 746 (2014).

23 The concept of domicile contains three equivalent options, namely statutory seat, central administration, and principal place of business (Art. 63 Brussels I Regulation).

24 See Art. 8(1) Brussels I Regulation in case the subsidiary is domiciled within the EU. When the subsidiary is domiciled outside the EU, the French, Belgian, or English private international law is applied; see Art. 42 of the French new Code on Civil Procedure, Art. 9 of the Belgian Code on Private International Law, and the English Practice Direction, 6 B, para. 3.1(3).

25 A garment factory in Dhaka, Bangladesh collapsed and over 1,000 workers were killed. See, e.g., http://www.theguardian.com/world/2013/apr/24/bangladesh-building-collapse-shops-west.

26 Codes of conduct are more and more enacted by MNEs. See, e.g., the efforts made in the Clean Clothes Campaign, http://www.cleanclothes.org/ and the code of conduct enacted by H&M (with a Swedish mother company), http://www.google.be/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDMQFjAA&url=http%3A%2F%2Fabout.hm.com%2Fcontent%2Fdam%2Fhm%2Fabout%2Fdocuments%2Fen%2FCSR%2Fcodeofconduct%2FCode%2520of%2520Conduct_en.pdf&ei=KgaDU-ajJomLOPejgOAJ&usg=AFQjCNE7RNLgqGp4Jh23eGsOBR6DK5uy2g&bvm=bv.67720277,d.ZWU&cad=rja.

continuing of loss-making activities.[27] Nor will we study criminal responsibility of the mother company as we assume that the activities of the subsidiary or mother company are not crimes or at least not prosecuted as such.

2. French and Belgian Law

French and Belgian law are especially interesting because they have a generally permissive tort law. The rules on veil piercing in these countries are not very elaborate, except for where statutory grounds permit veil piercing in case of insolvency. Nevertheless, they rely on existing contractual and tortious arrangements to hold a shareholder liable. Their tort and contract law strongly resembles as the provisions we will discuss are quasi-unchanged since they have been enacted in the *Code Napoléon*. We will discuss them together and refer explicitly to the one or the other law in case of differences.

In French and Belgian law, the general principle is that each legal person is autonomous, even when legal persons form a group.[28] A company has its own assets, and shareholders are not liable for more than their contribution.[29] This is also known as the *Trennungsprinzip*.[30] It is acknowledged that these rules, however, need to be put aside when they would lead to socially unacceptable outcomes.[31] Neither law has specific rules on corporate groups or piercing the corporate veil,[32] despite several attempts to enact such a law in France (the *Cousté* proposals).[33] The general contract and tort law is applied in order to hold the shareholders of a company liable.

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27 See, e.g., C.M. Brüls, *RPS* 2004, pp 314–316; K. Vandekerckhove, *Piercing the Corporate Veil*, pp 105–379.

28 H. De Wulf (BE), 'Concernrechterlijke aansprakelijkheid', in *Bestendig handboek vennootschap en aansprakelijkheid*, eds I. Cuypers *et al.* (Mechelen: Kluwer), loose leaf and www.jura.be, III. 5-4.

29 Article L 223-1 French *Code de Commerce* and Arts 210 and 437 Belgian Company Code; Cass. be. 26 May 1978, *Pas. (Pasicrisie)* 1978, I, p 1108 = *RW (Rechtskundig Weekblad)* 1978–1979, p 846, note H. Braeckmans; Z. Gallez, in C. Brüls (ed.), 'La responsabilité de la société mère pour sa filiale: réflexions sur la levée du voile social', in *Les multinationals – Statut et réglementations* (Brussels: Larcier 2013), p 153.

30 M. Dambre (BE), 'De bescherming van de schuldeisers van een dochtervennootschap in het internationaal privaatrecht', in *Aspecten van de ondernemingsgroepen*, eds H. Biron & C. Dauw (Antwerp: Kluwer Rechtswetenschappen 1989), p 231.

31 J. Ronse & J. Lievens (BE), 'De doorbraakproblematiek', in *Rechten en plichten van moeder- en dochtervennootschappen*, eds H. Biron & C. Dauw (Mechelen: Kluwer 1986), p 163.

32 C.M. Brüls (BE), *RPS* 2004, p 303; H. De Wulf (BE), in: *Bestendig handboek vennootschap en aansprakelijkheid*, III.5-2; V. Simonart, *La personnalité morale*, p 459; K. Vandekerckhove, *Piercing the Corporate Veil*, p 28.

33 *Proposition de loi sur les groupes de sociétiés et la protection des actionnaires et du personnel*, submitted to Parliament on 19 Feb. 1970 (no. 1055) and on 12 Apr. 1973 (no. 52).

We will first discuss several provisions of tort law: the general Article 1382 and the vicarious liability Article 1384 of the French and Belgian Civil Code. In Belgium, liability of a shareholder can be established by proving the abuse of limited liability, an application of the concept of abuse of right. In France, other legal devices are more popular, such as fraud, concealment, and the creation of false appearances. We will not discuss the French Rozenblum doctrine on the basis of which a director should, under certain conditions, refuse to cooperate to the benefit of the group but to the detriment of his own company.[34] Nor will we discuss the rather easily accepted liability of a mother company in case of *co-emploi*. This is the situation in French law in which a mother company is recognised as the employer, in order to allow the employee to claim, for instance, his severance pay not only from the subsidiary that is his actual employer but also from the mother company.[35]

2.1. Article 1382 Civil Code

According to Article 1382 Civil Code, '[any] act whatever of man, which causes damage to another, obliges him by whose fault it occurred, to compensate it'.[36] Article 1383 Civil Code provides the same for negligence causing damage. In French and Belgian law, a person incurs liability under Article 1382 or Article 1383 when three conditions are fulfilled: a fault, damage, and a causal link between the fault and the damage. Legal persons are subject to these provisions, just as natural persons. When a representative of the legal person commits a fault, it will be imputed to the legal person.[37] The term 'representative' is interpreted broadly as it even includes a *de facto* director.[38]

The first condition, *fault*, constitutes of the violation of a statutory rule or the violation of a duty of care, whether intentional or not.[39] When a person does not act as a reasonably forward-looking and careful person, as a *bonus pater familias*, he/she has infringed the duty of care.

34 K. Vandekerckhove, *Piercing the Corporate Veil*, pp 227–228.

35 J. Perotto & N. Mathey, 'La mise en jeu de la responsabilité de la société mère est-elle une fatalité? – Regard croisés sur les groupes de sociétés et le risque de coemploi', *JCP Social (Semaine Juridique Edition Social)* 2014, p 1262.

36 '*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer.*'

37 Cass. fr. (2nd Civ.) 17 Jul. 1967, *Bull. Civ.* 1967, II, nr. 261; V. Simonart, *La personnalité morale*, p 451.

38 A.P. Schoonbrood-Wessels (FR), 'Aansprakelijkheid in concernverhoudingen naar Frans recht', in *Aansprakelijkheid in concernverhoudingen*, eds L.G.H.J. Houwen, A.P. Schoonbrood-Wessels & J.A.W. Schreurs (Deventer: Kluwer 1993), p 437.

39 P. Malinvaud & D. Fenouillet (FR), *Droit des obligations* (Paris: LexisNexis 2012), p 456; W. Van Gerven (BE), *Verbintenissenrecht* (Leuven: Acco 2006), p 367.

As the damage will, in most cases, clearly be caused by the subsidiary, it will not be easy to prove that the mother company has committed a fault as well. If a mother company has made a statement concerning corporate social responsibility however, the mother company set the standard for the duty of care higher for itself. In that case, it will be accepted more easily that it is liable for its subsidiary's acts or negligence.[40] Apart from this hypothesis, it can be argued that the mother's omission to intervene is a fault. When the mother company knew about the unacceptable acts of its subsidiary and looked the other way, a judge will be right to decide that the mother company is liable because it did not use its ability to control to end the unacceptable practices.[41] One might even go further and argue that even if the mother company did not know about the unacceptable acts, it is liable for omission because it did not follow its subsidiary up closely enough. The latter two applications of the fault in a company group context come down to liability as *de facto* director (*dirigeant de fait*).[42] The mother company might have assumed the management of its subsidiary and will be liable for faults it commits in its management.[43] When the judge decides whether something amounted to a fault or not, he must however take into account the policy margin a director has.[44]

The *damage* is the loss of a patrimonial or extra-patrimonial benefit and can be material or immaterial.[45] Proving that this condition is fulfilled will, in most cases, be the easiest part of proving liability under Article 1382 or 1383 Civil Code.[46]

The claimant also has to prove the *causal link* between the fault and the damage before he/she can recover damages. In French case law and doctrine, it is not entirely clear whether the causal link must be proven according to the 'doctrine of effective cause' or according to the 'equivalence doctrine', although a

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40 Y. Queinnec & M.C. Caillet, 'Quels outils juridiques pour une régulation efficace des activités des sociétés transnationales?' in *Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, ed. I. Daugareilh (Brussels: Bruylant 2010), p 654; I. Desbarats (FR), 'La valeur juridique d'un engagement dit socialement responsable', *JCP E (Semaine juridique édition entreprise)* nr. 5, 2 Feb. 2006, p 1214, nr. 20.

41 V. Thomas (FR), *Rev. Proc. Coll.* 2013, nr. 13.

42 Z. Gallez, *Les multinationals – Statut et réglementations*, p 163.

43 L. Cornelis (BE), 'De aansprakelijkheid van bestuurders van vennootschappen in groespsverband', in *Aspecten van de ondernemingsgroepen*, eds H. Biron & C. Dauw (Antwerp: Kluwer Rechtswetenschappen 1989), p 166.

44 M. Vandenbogaerde (BE), *Aansprakelijkheid van vennootschapsbestuurders* (Antwerp: Intersentia 2009), p 131.

45 P. Malinvaud & D. Fenouillet (FR), *Droit des obligations*, p 439; W. Van Gerven (BE), *Verbintenissenrecht*, pp 447 and 454.

46 Y. Queinnec & M.C. Caillet, in: *Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, p 654.

preference can be discerned for the latter.[47] Belgian law clearly adheres to the 'equivalence doctrine'.[48] This means that there is a causal link whenever the fault has contributed to the existence of the damage. The 'doctrine of effective cause' is more stringent, and the causal link will only be accepted when the fault was likely to cause the damage and actually has played a chief role in causing the damage. As the 'equivalence doctrine' is much more permissive, it will be to the benefit of the victims if it is applied, which is certain under Belgian law and likely under French law.

With regard to the causal link, the defendant can escape or reduce liability by proving that he/she was not the only factor contributing to the existence of the damage. *Force majeure*, acts by a third party and a fault of the victim itself can all break the causal link.[49] However, this will not really disadvantage the victims as whenever the company is partly liable, it is liable *in solidum* to pay the whole amount of damages it owes to the victims.[50] Only later, it can (try to) claim the determined amount back from the other persons that are liable.

2.2. *Article 1384 Civil Code: Vicarious Liability for Employees*

In both French and Belgian laws, a person is not only liable for its own acts or omissions but also for the acts and omissions by his/her appointee(s) (*préposé*). Article 1384, 3rd limb for Belgian law and Article 1384, 5th limb Civil Code for French law state that 'masters and employers [are liable] for the damage caused by their servants and employees in the functions for which they have been employed'.[51] An employer or any other 'appointer' is thus liable for a fault committed by his employees, or 'appointees', while employees themselves will only rarely be liable.[52] Article 1384 was enacted to ensure that a victim can claim damages from a solvent person. The 'master' plays a guaranteeing role.[53] This *ratio* is definitely valid for liability in group law.

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47 *Ibid.*, p 655; P. Malinvaud & D. Fenouillet, *Droit des obligations*, p 542.

48 W. Van Gerven, *Verbintenissenrecht*, p 417.

49 P. Malinvaud & D. Fenouillet (FR), *Droit des obligations*, p 547; W. Van Gerven (BE), *Verbintenissenrecht*, p 430 ff.

50 Cass. fr. 11 Jul. 1892, *D.* 1894, I, p 561 = *S. (Sirey)* 1892, I, p 505; Cass. be. 10 Jul. 1952, *Pas.* 1952, I, p 738 = *Arr.Cass. (Arresten van het Hof van Cassatie)* 1952, p 650; P. le Tourneau (FR), *Droit de la responsabilité et des contrats* (Paris: Dalloz 2012), p 664; W. Van Gerven (BE), *Verbintenissenrecht*, p 555.

51 '*Les maîtres et les commettants [sont responsables] du dommage causé par leurs domestiques et préposés dans les fonctions auxquelles ils les ont employés*'.

52 See Art. 18 Belgian Employment Contracts Law (law of 3 Jul. 1978): the employee will only be liable for fraud, his *culpa lata*, and his not accidental *culpa levis*. In French law, an employee will only be personally liable when he exceeds the limit of his job function in committing a fault. See Cass. fr. (Com.) 12 Oct. 1993, nr. 91-10864, *Bull.* 1993, IV, nr. 338.

53 P. Malinvaud & D. Fenouillet (FR), *Droit des obligations*, pp 473–474.

A mother company will, however, generally not be liable for any fault committed by its subsidiary as the latter is not regarded as the appointee of the mother company, although some authors argue so.[54] However, a director of the subsidiary can, at the same time, be an employee of the mother company, in which case the mother company can be vicariously liable for its employee. It can also be argued that the director is appointed by the mother company even if he/she is not an employee in the strict sense. In this case, it is not imaginary that a fault of the director will engage the liability of the mother company on the basis of Article 1384 Civil Code.[55]

To engage the liability of the employer, both in French and Belgian law, three conditions have to be fulfilled. First, there has to be a bond of subordination or appointment.[56] The employee is not only socially or economically dependent, but the employer has the right to give orders and instructions, although he need not exercise this right.[57] It might be so that the employee is granted considerable freedom to act and it is not even required that the employee acted in accordance with the instructions of the employer.[58] The first condition is even fulfilled when the defendant has, in the eyes of a reasonable third party, created the appearance that he/she has the right to give orders and instructions.[59] A labour contract is not required, nor need there be any wage for the employee.[60] Second, the employee has committed a fault as defined in Articles 1382 and 1383 Civil Code, although the liability of the employee himself must not be established.[61] The third and last condition is that the employee has caused the damage while exercising his/her function.[62] A mother company will probably argue that the person that caused the damage only exercised his function in the subsidiary and not the function he/she has for the mother company. However, the last condition is interpreted particularly broad and it is enough that the damage would not be

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54 See, e.g., Y. Queinnec & M.C. Caillet, in: *Responsabilité sociale de l'entreprise transnationale et globalisation de l'économie*, pp 652–653.

55 B. De Moor (BE), 'Aansprakelijkheid van bestuurders van groepsverbonden vennootschappen', in *Bestendig handboek vennootschap en aansprakelijkheid*, eds I. Cuypers *et al.* (Mechelen: Kluwer), loose leaf and www.jura.be, III.6-37 and III.6-44.

56 *Ibid.*, p 483.

57 Cass. be. 27 Feb. 1970, *Pas.* 1970, I, p 565; J. Ronse & J. Lievens (BE), in: *Rechten en plichten van moeder-en dochtervennootschappen*, p 162.

58 Cass. be. 3 Jan. 2002, C.99.0035.N, *AJT (Algemeen juridisch tijdschrift)* 2001-02, p 768, note I. Boone.

59 W. Van Gerven (BE), *Verbintenissenrecht*, p 390.

60 J. Ronse & J. Lievens (BE), in: *Rechten en plichten van moeder- en dochtervennootschappen*, p 163.

61 P. Malinvaud & D. Fenouillet (FR), *Droit des obligations*, pp 484–485; W. Van Gerven (BE), *Verbintenissenrecht*, p 392.

62 P. Malinvaud & D. Fenouillet (FR), *Droit des obligations*, p 488; W. Van Gerven (BE), *Verbintenissenrecht*, p 393.

present in such a way if the subordinate had never been employed.[63] Once these three conditions are fulfilled, the employer has no defence as this provision enacts a non-rebuttable presumption of liability.[64]

2.3. *Vicarious Liability for Subsidiaries in French Law?*

Since the 1990s, French case law interprets the first limb of Article 1384 Civil Code broadly.[65] This provision states that one is not only liable for its own deeds but also for the deeds of the persons for whom one is answerable. In French law, a general liability for others is deducted from this phrase (*responabilité générale du fait d'autrui*).[66] So far, the French courts have only accepted liability for persons that were charged with supervision over others, such as children and disabled persons. If the liability of a mother company for deeds of its subsidiary were to be accepted, it would be much easier to hold the mother company liable than it currently is under Article 1384, 5th limb French Civil Code.

When a mother company closely follows up all activities of its subsidiary, it can definitely be argued that the mother company has taken up responsibility for the deeds of its subsidiary and should be liable according to Article 1384, first limb.[67] Although this has never been accepted by the courts, we could not find any judgment rejecting such an argument either. More and more cases come into the scope of the first limb of Article 1384, and the determining criterion seems to be the authority of one person over another.[68] A case decided by the *Cour de Cassatio*n in 2006 will be helpful to argue that a mother company should be liable. In this case, the court decided that a labour union is not responsible for what its demonstrating members do because labour unions have 'not as a goal or as a mission to organize, direct or control the activity of its members in the course of movements or manifestations in which the members participate'.[69] This

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63 See, for instance, Cass. be. 7 Feb. 1969, *RW* 1968–1969, p 1545. An employer is, for instance, even liable when his employee causes a traffic accident while driving a company car without a driver's licence after his working hours. See Cass. be. 2 Oct. 1984, *Arr.Cass.* 1984–1985, p 181.

64 P. le Tourneau (FR), *Droit de la responsabilité et des contrats*, nr. 7555; W. Van Gerven (BE), *Verbintenissenrecht*, p 389.

65 In Belgian law, the first limb of Art. 1384 is merely seen as an introduction to the more specific vicarious liabilities determined in limbs two, three, and four.

66 Cass. fr. (Ass. plén.) 29 Mar. 1991, nr. 89-15231, *Bull. A.P.* 1991, nr. 1; P. le Tourneau, *Droit de la responsabilité et des contrats*, nr. 7352; P. Malinvaud & D. Fenouillet, *Droit des obligations*, p 475.

67 N. Mathey, 'La responsabilité sociale des entreprises en matière de droits de l'homme', *JCP E* 2010, nr. 3, dossier 13, 2.A.1.

68 P. le Tourneau, *Droit de la responsabilité et des contrats*, nr. 7359.

69 Cass. fr. (2nd Civ.) 26 Oct. 2006, nr. 04-11665, *Bull. Civ.* 2006, II, nr. 299 = *JCP* 2007, II, 10004, note J. Mouly = *D.* 2007, p 204, note B. Laydu = LPA 3 Jan. 2007, 15, note M. Brusorio = LPA 23 Jan. 2007, 11, note J.-F. Barbièri = *JCP* 2007, I, p 115, nr. 5, note Ph. Stoffel-Munck = *Rtd. civ.* 2007, p 357, note P. Jourdain. The original version of this citation is that labour

motivation can be turned around to argue that a mother company is liable for the deeds of its subsidiary: if a mother company has as a goal or a mission to organize, direct, and control the activities of its subsidiary, the mother company is liable for the deeds of this subsidiary. Already in 1981, Schmidt argued that a parent company should be liable for the debts of its subsidiary on the sole basis of the power exercised by the parent in the group.[70]

Following the 200th anniversary of the French Civil Code, several initiatives have been taken to rewrite the code. One of these initiatives is the *projet Catala*.[71] If the latter were to become positive law, liability of mother companies for the deeds of their subsidiaries will be much easier to establish. Article 1360, 2nd limb of the *projet Catala* introduces the liability of a mother company for all damage caused by its subsidiaries.[72] This proposed provision is subject to the criticism that the basic principles of legal personality are denied.[73] It is defended by its enactors as this provision ensures that the real deciders bear the responsibility and that the victims are better protected.[74]

2.4. *Abuse of Right*

The privilege of limited liability is a right that can be abused.[75] Especially in Belgium, creditors of a company rely on the doctrine of abuse of right to hold the shareholder/mother company liable for the debts of the subsidiary. In France, this

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unions have '*ni pour objet ni pour mission d'organiser, de diriger et de contrôler l'activité de ses adhérents au cours de mouvements ou manifestations auxquels ces derniers participent*'.

70 D. Schmidt, 'La responsabilité civile dans les relations de groupe de sociétés', *Rev. Soc. (Revue des Sociétés)* 1981, pp 736–738.

71 P. Catala, *Avant-projet de réforme du droit des obligations et de la prescription* (Paris: La documentation française 2006).

72 Article 1360, limb 2 states that '*[de] même, est responsable celui qui contrôle l'activité économique ou patrimoniale d'un professionnel en situation de dépendance, bien qu'agissant pour son propre compte, lorsque la victime établit que le fait dommageable est en relation avec l'exercice du contrôle. Il en est ainsi notamment des sociétés mères pour les dommages causés par leurs filiales […]*'.

73 See, e.g., V. Thomas, *Rev. Proc. Coll.* 2013, nr. 3; X, *Rapport du groupe de travail de la Cour de cassation sur l'avant-projet de réforme du droit des obligations et de la prescription*, 15 Jun. 2007, http://www.courdecassation.fr/institution_1/autres_publications_discours_2039/discours_2202/travail_cour_10699.html, nr. 79.

74 G. Viney, 'Sous-titre III – De la responsabilité civile (Articles 1340 à 1386). Exposé des motifs', in *Avant-projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil)* (2005), www.justice.gouv.fr, p 147.

75 Such abuse was historically based on Arts 544 and 1382 of the Civil Code but is now by some said to be a general principle of law. See A. De Boeck, 'Rechtsmisbruik', in *Bijzondere Overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (Antwerp: Kluwer 2011), pp 6 and 8–10; P. Van Ommeslaghe, *Traité de droit civil belge. II. Les obligations. Vol. 1* (Brussels: Bruylant 2013), p 65, nr. 22 and p 73, nr. 25.

doctrine exists as well,[76] but concealment, fraud, and creation of false appearances are more relied on to establish the liability of the mother company. The following is therefore based on Belgian case law and doctrine.

When making use of the doctrine of abuse of right, the claimant first has to prove that the subsidiary is liable, no matter what the basis for its liability is. Then, the victim can file a claim against the mother company for abuse of the privilege of limited liability. If he/she can prove that the mother company does not earn the privilege of limited liability because it did not respect the rules concerning the autonomy of the subsidiary, the corporate veil will be pierced.[77] However, the threshold for abuse is high as only when the right was exercised in a way that *obviously* goes beyond the way it would be exercised by a reasonably forward-looking and careful person, there is an abuse.[78] The case law has pointed out several indications of abuse, which are not cumulative but need to be consistent.[79] Most indications concern the non-respect for the subsidiary's autonomy.[80]

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76 See, e.g., V. Cuisinier, 'Les groupes et la responsabilité de la société mère', *Rev. Proc. Coll.* 2013, nr. 6, dossier 54; N.F. Raad, *L'abus de la personnalité morale en droit privé* (Paris: L.G.D.J. 1991). For an application of this doctrine in France, see on the abuse of a shareholder's voting right: Cass. fr. (Com.) 13 Mar. 2001, nr. 98-16.197, *Bull. Civ. (Bulletin des arrêts de la Cour de Cassation. Chambres civiles)* 2001, IV, nr. 60 = *D.* 2001, 1175, note A. Lienhard = *Dr. Sociétés (Droit des sociétés)* 2001, comm. 101, note F.-X. Lucas = *JCP E* 2001, 953, note A. Viandier = *RTD Com. (Revue trimestrielle de droit commercial)* 2001, p 443, note C. Champaud & D. Danet = *Dr. sociétés* 2001, comm. 78, Th. Bonneau = *Rev. Sociétés* 2002, p 818, note B. Dondero.

77 C.M. Brüls, *RPS* 2004, p 312; L. Cornelis, in: *Aspecten van de ondernemingsgroepen*, p 181; K. Geens *et al.*, 'Overzicht van rechtspraak – Vennootschappen 1992–1998', *TPR (Tijdschrift voor privaatrecht)* 2000, p 342; K. Geens & M. Wyckaert, *Verenigingen en vennootschappen, II De vennootschap, A. Algemeen deel, in Beginselen van het Belgisch privaatrecht* (Mechelen: Kluwer 2011), p 340; J. Ronse, J.-M. Nelissen Grade, K. van Hulle, J. Lievens & H. Laga, 'Overzicht van rechtspraak – Vennootschappen 1978–1985', *TPR* 1986, pp 939 and 948–949; J. Ronse & J. Lievens, in: *Rechten en plichten van moeder- en dochtervennootschappen*, pp 137 and 170; K. Vandekerckhove, *Piercing the Corporate Veil*, p 32. A shareholder might have set up a subsidiary to prevent its creditors from reaching its assets.

78 Cass. be. 10 Mar. 1983, *Arr. Cass.* 1982–1983, p 847; A. De Boeck, *Rechtsmisbruik* (Mechelen: Kluwer 2011), p 12; K. Geens & M. Wyckaert, *Verenigingen en vennootschappen*, p 343; J. Ronse *et al.*, 'Overzicht van rechtspraak – Vennootschappen 1978–1985', p 949.

79 Cass. be. 11 Sep. 1981, *Rev. Prat. Soc. (Revue Pratique des Sociétés)* 1982, nr. 6187, p 126 = *BRH (Belgische Rechtspraak in Handelszaken)* 1982, p 280 = *Pas.* 1982, I, p 56; K. Geens *et al.*, 'Overzicht van rechtspraak – Venootschappen 1999–2010', *TPR* 2012, p 219; K. Geens *et al.*, 'Overzicht van rechtspraak – Vennootschappen 1992-1998', p 230; K. Geens & M. Wyckaert, *Verenigingen en vennootschappen*, p 342.

80 Such as the lack of a division between the assets of the mother company and the subsidiary, no separate bookkeeping and undercapitalization of the subsidiary. Other indications are the fact that (almost) all shares of the subsidiary are owned by the mother, the fact that rules concerning the organs of the subsidiary are not respected, and that in communication with third parties,

The piercing of the corporate veil is based on the adage *Contra proprium factum nemo venire potest*.[81] This means that no one may set himself in contradiction to his/her own previous conduct and it is comparable to estoppel by conduct. If the judge finds an abuse of right, he will reduce this right to its normal use.[82] This means that there will be no limited liability in as far as there is abuse. When the reduction of the right to its normal use is no longer possible, damages will be awarded.[83]

Proving the fault of the mother company under Article 1382 Civil Code (cf. *supra* Article 1382 Civil Code) is a more direct way to get to the mother company than proving the liability of the subsidiary and the abuse of the privilege of limited liability by the mother company. It is, however, an extra possibility to hold the mother company liable, especially when the mother company and subsidiary are closely intertwined.

2.5. Concealment

While Belgian doctrine mostly relies on the doctrine of abuse of right to pierce the corporate veil, concealment (*simulation*), fraud (*fraude*), and the creation of false appearances (*apparence*) play an important role in French law. All these concepts exist in Belgian law as well, so they can be invoked to hold a mother company liable.[84]

There is concealment when parties to a contract intentionally differentiate between their expressed and actual intentions.[85] This is, for instance, the case when parties agree on a higher price than the one written in their contract in

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reference is made to the mother company instead of to the subsidiary, or the fact that decisions are made to the benefit of the mother company but to the detriment of the subsidiary. The indications that were before used for the doctrine of undisclosed agency (*prête-nom*) to extend insolvency proceedings to the mother company can still be used. On the concepts of disclosed and undisclosed agency, see D. Busch, *Middelllijke vertegenwoordiging in het Europese contractenrecht* (Deventer: Kluwer 2002), pp 149–160. On the concept of *prête-nom*, see I. Samoy, *Middellijke vertegenwoordiging: vertegenwoordiging herbekeken vanuit het optreden in eigen naam voor andermans rekening* (Antwerp: Intersentia 2005), p 125. On the extension of insolvency proceedings, see, e.g., H. Braeckmans, 'Toerekening van het vennootschapsfaillissement aan de achterman of de uitbreiding van het faillissement tot de meester van de zaak' (comment on Cass. 26 May 1978), *RW* 1978–1979, pp 852–854.

81 V. Simonart, *La personnalité morale*, pp 534–535; J. Ronse & J. Lievens, in: *Rechten en plichten van moeder- en dochtervennootschappen*, p 169.

82 Cass. be. 16 Dec. 1982, *Pas.* 1983, I, p 472.

83 A. De Boeck, in: *Bijzondere Overeenkomsten* p 20; P. Van Ommeslaghe, *Traité de droit civil belge*, pp 92–93, nr. 36.

84 See, e.g., Court of Appeal Antwerp 12 Dec. 1995, *TRV* 1996, p 62; Cass. be. 6 Dec. 1996, C.950260.N, www.cass.be.

85 P. Wéry (BE), *Droit des obligations*, I (Brussels: Larcier 2011), p 877.

order to avoid taxes. According to Article 1321 Civil Code, third parties can choose to rely on the consequences of the expressed intentions or on the consequences of the actual intentions.[86]

Concealment can be a tool in a company group to organize the insolvency of a certain company in order to escape from its creditors.[87] A company that was founded with merely this goal is considered a fictitious company (*socitété fictive*).[88] The company serves to hide the activities of another (natural or legal) person and none of the shareholders has an *affectio societatis*.[89] The indications of concealment match to a large extent the indications of abuse of right (cf. *supra* Abuse of Right), such as the absence of decent bookkeeping, the malfunction of organs, and the lack of decision-making power of organs.[90] MNEs will, however, rarely have such a poor administration, but if they have, this can be deployed to the benefit of the victims of the subsidiary's practices.

2.6. Fraud

Fraud is another legal basis that is particularly popular in French law to establish the liability of a mother company. Again, it exists in Belgian law as well,[91] although there, another adage is more likely to be applied, namely *Nemo contra factum proprium venire potest* (cf. *supra* Abuse of Right).[92] The adage *fraus omnia corrumpit* means that no one may invoke his own fraud in order to justify the application of legal rules to his benefit. Usually the legislator enacts provisions to prevent that this is possible, but he cannot foresee all situations. The adage is therefore recognized as a general principle of law (*principe général de droit*).[93] The judiciary will rely on the principle to hold a mother company liable if the

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86 K. Geens & M. Wyckaert (BE), *Verenigingen en vennootschappen*, p 326; P. Malinvaud & D. Fenouillet (FR), *Droit des obligations*, p 227; W. Van Gerven (BE), *Verbintenissenrecht*, p 878.

87 P. Malinvaud & D. Fenouillet (FR), *Droit des obligations*, p 223.

88 See, e.g., Court of Appeal Bastia 19 Oct. 2011, nr. 10/00457, www.legifrance.gouv.fr.

89 Cass. fr. (Com.) 22 Jun. 1999, nr. 98-13611, *Bull.* 1999, IV, nr. 136; A.P. Schoonbrood-Wessels (FR), in: *Aansprakelijkheid in concernverhoudingen*, pp 472–473.

90 A.P. Schoonbrood-Wessels (FR), in: *Aansprakelijkheid in concernverhoudingen*, p 474.

91 See A. Lenaerts (BE), 'Fraus omnia corrumpit: autonome rechtsfiguur of miskend correctiemechanisme?', *RW* 2013–2014, p 362. For the French language version of this text, see A. Lenaerts (BE), 'Le principe général du droit *fraus omnia corrumpit:* une analyse de sa portée et de sa fonction en droit privé belge', *RGDC (Revue Générale de Droit Civil Belge)* 2014, nr. 3, pp 98–115.

92 K. Geens & M. Wyckaert (BE), *Verenigingen en vennootschappen*, p 342.

93 P. Malinvaud & D. Fenouillet (FR), *Droit des obligations*, p 222; A. Lenaerts (BE), 'Fraus omnia corrumpit: autonome rechtsfiguur of miskend correctiemechanisme?', p 362; P. Wéry (BE), *Droit des obligations*, p 248.

mother company itself does not respect the legal autonomy of its subsidiary but invokes it *vis-à-vis* third parties.

Fraud entails that the company applies faulty behaviour in order to damage another person.[94] The faulty behaviour can consist of a manoeuvre or a violation of the duty of care. Next to this objective element, there must also be a subjective element. The company must have applied the behaviour with the intention of damaging another person.[95]

Fraud has two potential consequences: the nullity of the whole mechanism or the impossibility to invoke a certain act (*inopposabilité*).[96] Here, there is no need to argue for the nullity of the subsidiary. It is sufficient when its existence cannot be invoked against the victims.

The consequence of fraud and concealment, the fact that the fraudulent act cannot be invoked against the third party, is exactly the same. The difference lies in the required proof. To establish fraud, the victims have to prove the intention to damage another person. For concealment, the proof of the actual intention of the parties, as opposed to the expressed intention, is required. Proof of fraud is not necessary to establish liability for concealment.[97]

2.7. Creation of False Appearances

The last important doctrine in French law to establish the liability of a mother company is the judge-made theory on creation of false appearances.[98] In Belgian and French law, the legitimate confidence of a third party in a certain situation can be honoured by forcing the person that created the appearance to live up to it.[99] This is again comparable to estoppel by conduct.

It is rather unlikely that this theory will be relevant when a subsidiary has caused damage in tort. The damage then just happens to the victim and the victim did not think about the constellation of the company or group so he/she cannot have had legitimate confidence in the unity of the group. Even for contractual creditors, a claim on the basis of creation of false appearances is only accepted in

94 A. Lenaerts, 'Le principe général du droit *fraus omnia corrumpit:* une analyse de sa portée et de sa fonction en droit privé belge', p (98) 111.

95 Cass. fr. (Com.) 2 Jun. 1987, *Bull. Civ.* 1987, IV, nr. 132.

96 Cass. fr. (1st Civ.) 4 Dec. 1990, nr. 88-17991, *Bull.* 1990, I, nr. 278; P. Malinvaud & D. Fenouillet (FR), *Droit des obligations*, p 222.

97 Cass. fr. (3rd Civ.) 4 Jun. 2003, *Bull. Civ.* 2003, III, nr. 123, p 110 = *JCP N (Semaine juridique édition notariale et immobilière)* 2004, nr. 1269, note M. Dagot.

98 A.P. Schoonbrood-Wessels, in: *Aansprakelijkheid in concernverhoudingen*, p 453; P. Wéry, *Droit des obligations*, p 876.

99 C. Caufmann (BE), 'De vertrouwensleer', in *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer, IV. Commentaar Verbintenissenrecht* (Antwerp: Kluwer 16 Feb. 2005), pp 15–18; B. Grimonprez (FR), *Rev. Soc.* 2009, nr. 11.

rare situations.[100] Even if one thinks of applying this theory, it will be better to rely on fraud or concealment, as the latter require no proof of the legitimate confidence in the created situation.

3. English Law

In English law, just as in French and Belgian law, the general principle is that the legal person only is liable for his debts, while the shareholders benefit from their limited liability. This principle has since long been established in *Salomon* v. *Salomon*.[101]

However, exceptions exist to the principle that the corporate veil cannot be pierced. We will first look at tortious liability, particularly at the decision in *Chandler* v. *Cape*.[102] Liability in tort concerns a duty of care of the mother company and has therefore nothing to do with the grounds for piercing the corporate veil. It can be referred to as 'crossing the corporate veil'.[103] Afterwards, we will analyse which grounds to pierce the corporate veil can be relevant when involuntary creditors, particularly victims in tort, claim damages from the mother company.

3.1. Tort of Negligence: Breach of a Duty of Care

The equivalent in English law for Articles 1382 and 1383 of the French and Belgian Civil Code is the tort of negligence. A person is liable in negligence when (i) he/she owes a duty of care to the victim, (ii) he/she has breached that duty, (iii) the victim's damage is not so unforeseeable as to be too remote, and (iv) there is a causal connection between the careless conduct and the damage.[104] Most attention goes to determining whether or not a person owes a duty of care to another. To establish a duty of care, a three-stage test, also known as the Caparo test, must be fulfilled. First, the potential for harm has to be foreseeable.[105] Second is the proximity requirement. A person can only be entitled to damages if he/she is 'so closely and directly affected that [he/she] should be in [the tortfeasor's] contemplation'.[106] Third, it must be fair, just, and reasonable to impose a duty of care.[107] Especially due to the third condition, it will not be easy to prove that a mother company owes a duty of care to a person affected by its

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100 See, e.g., Cass. fr. 20 May 2014, nr. 12-26.705, 12-26.970 and 12.29.281. It is, for instance, not sufficient that both companies have the same directors. See Cass. fr. (Com.) 15 Oct. 1974, nr. 73-12391, *Rev. Soc.* 1975, 495, note Y. Guyon.

101 *Salomon* v. *Salomon* [1897] AC 22.

102 *Chandler* v. *Cape Plc* [2012] EWCA Civ 525.

103 A. Sanger, *CLJ* 2012, pp 478–481.

104 M. Dugdale *et al.*, *Clerk & Lindsell on Torts* (19th edn, London: Sweet & Maxwell 2006), p 383.

105 *Donoghue* v. *Stevenson* [1932] AC 562.

106 *Ibid.*; *Dorset Yacht Co Ltd.* v. *Home Office* [1970] AC 1004.

107 *Caparo Industries Plc* v. *Dickman and Others* [1990] 2 AC 605.

subsidiary. Courts can take account of all social and public policy implications of imposing liability.[108] However, once the duty of care is established, it is rather likely that the mother company will be liable. The test set out here will be very important to establish the liability of the mother company as it is particularly used to extend liability or to overturn existing limitations on liability, as illustrated in *Chandler* v. *Cape*.[109]

In common law, a person has no general duty to prevent third parties from harming others.[110] A mother company therefore has no duty to prevent its subsidiary from harming employees or third parties through its business activities. However, in *Connelly* v. *RTZ Corp plc*. and *Lubbe* v. *Cape*, the courts seemed to hint that the tide could turn. In *Connelly*, the judge stated that 'there may […] be some other person or persons who owe a duty of care to an individual plaintiff which may be very close to the duty owed by a master to his servant'.[111] This action was, however, time-barred. In *Lubbe* v. *Cape*, Lord Bingham of Cornhill mentioned 'the responsibility of the defendant as a parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries'.[112] *Lubbe* v. *Cape* was settled, so the court did not get a chance to definitively decide on Cape's liability in this case.

In *Chandler* v. *Cape*, however, the High Court decided that Cape was liable in tort towards a former employee of its subsidiary, Cape Products, who had been dissolved before. The former employee, Chandler, worked for Cape Products in the United Kingdom and not in South Africa as in *Lubbe* v. *Cape*. Because of exposure to asbestos during his work, Chandler suffers from asbestosis 50 years later. The judge first states that there is no general duty to prevent damage to another but then cites *Smith* v. *Littlewoods* to show that exceptions to this principle are possible. According to the *obiter dictum* by Lord Goff in *Smith* v. *Littlewoods*, one of these exceptions is 'a relationship between the parties which gives rise to an imposition or assumption of responsibility' on the part of the defendant.[113] Such a duty of care exists for instance between a main contractor or architect, on the one side, and the employees of a (sub)contractor, on the other side.[114] Whether there was such an assumption of responsibility by the mother company is a question of law that falls within the second and third stages of the

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108 M. Dugdale *et al.*, *Clerk & Lindsell on Torts*, p 392.

109 *Ibid.,* p 401.

110 *Smith* v. *Littlewoods Organisation Ltd.* [1987] AC 241, at 270; *Chandler* v. *Cape Plc* [2012] EWCA Civ 525, nr. 63.

111 *Connelly* v. *RTZ Corp Plc* [1999] CLC 533, at 538.

112 *Lubbe* v. *Cape Plc*, 2000 WL 976033, at 1555F.

113 *Smith* v. *Littlewoods Organisation Ltd.*, at 272D; *Chandler* v. *Cape Plc*, nr. 63.

114 *Clay* v. *A.J. Crump & Sons Ltd.* [1964] 1 QB 533; *Gray* v. *Fire Alarm Fabrication Services Ltd.* [2006] ECWA Civ 1496.

Caparo test.[115] Based on the facts, the court found a duty of care of Cape towards Cape Products' employees. The Court of Appeal gives an overview of circumstances that influenced their decision:

> *(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.*[116]

Other factors might be relevant as well and this is just an illustration of how the Caparo test can be satisfied.[117] Several elements are important to assess the likelihood of such a duty of a mother company in other cases. First, the emphasis is on what the mother company *ought to have known* and not on what it actually knows. This means that the ability to control the subsidiary is important and not the actual control.[118] Second, this case was not considered to be a veil piercing case. *Salomon* v. *Salomon* does not apply to protect the mother company, and Cape was not liable merely because it is the parent company of another company but because it owed a duty of care to the employees of its subsidiary.[119] As the whole case revolves around the alleged duty of care, corporate social responsibility statements by the MNE, such as a code of conduct, will help to find the existence of such a duty. Third, it is not required that the parent company has full control over its subsidiary before it can be liable.[120] According to Hughes, there should be 'a practice of intervention in trading operations, coupled with the utilisation of superior knowledge by a parent company and reliance on this by a subsidiary'.[121] Fourth, the assumption of responsibility need not be voluntarily done by the mother company.[122] Lastly, the cases that are cited, *Connelly* v. *RTZ* and *Lubbe* v. *Cape*, involve a subsidiary abroad, so there is no need to restrict the potential liability in tort towards employees of a British subsidiary only.[123]

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115 *Chandler* v. *Cape Plc*, nr. 62 and 64.

116 *Ibid.*, nr. 80.

117 *Thompson* v. *The Renwick Group Plc* [2014] EWCA Civ 635, at 33, citing *Clerk & Lindsell on Torts*, 20th edn, 3rd Supplement, para. 13-04.

118 E. McGaughey, 'Donoghue v. Salomon in the High Court', *J.P.I. Law (Journal of Personal Injury Law)* 2011, nr. 4, p 225; A. Sanger, *CLJ* 2012, p 480.

119 *Chandler* v. *Cape Plc*, nr. 69; E. McGaughey, *J.P.I. Law* 2011, nr. 4, p 249.

120 *Chandler* v. *Cape Plc*, nr. 66.

121 P. Hughes, *ECLR* 2014, p 86.

122 *Chandler* v. *Cape Plc*, nr. 64.

123 E. McGaughey, *J.P.I. Law* 2011, nr. 4, p 261.

Adams v. *Cape Industries* was a 1990 asbestos case where Cape's liability was not accepted. Although it involved similar facts and the same defendant, *Chandler* v. *Cape* is perfectly reconcilable with it. While *Chandler* v. *Cape* revolved around a duty of care and the *obiter* in *Smith* v. *Littlewoods*, the potential existence of a duty of care was never brought up in *Adams* v. *Cape Industries*.[124] *Chandler* v. *Cape* seems to withstand the judgment of other courts. The *obiter dictum* by Lord Goff in *Smith* v. *Littlewoods* was approved by the House of Lords in 2009.[125] In *Akzo Nobel* v. *Competition Commission*, the Competition Appeal Tribunal positively referenced to *Chandler* v. *Cape*.[126]

However, this does not mean that all courts give up their reluctance to hold a mother company liable. In *Thompson* v. *The Renwick Group*, the Court of Appeal recognizes *Chandler* v. *Cape* as good law but then distinguishes the case before it from *Chandler* v. *Cape*.[127] The facts are, however, utterly similar. Thompson was exposed to asbestos during his employment and he tries to hold the mother company, The Renwick Group, liable for his asbestosis.[128] The High Court judge had found liability of the Renwick Group, but this decision is overturned by the Court of Appeal. The court did not deem the following elements, among others, sufficient to find a duty of care:[129] the appointment of a director of the subsidiary by the mother company, the increased collaboration with other companies of the Renwick Group, and the involvement of Renwick in the day-to-day running and control.[130] According to the court, there could be no duty of care because the businesses of the mother company and the subsidiary were not, in a relevant respect, the same. This is the first hurdle set out in *Chandler*.[131] In our opinion, the Court of Appeal seems to require proof that amounts to evidence allowing the piercing of the corporate veil and mentions that the proof brought forward by the claimant 'does not mean that the legal personality of the subsidiaries separate from that of their ultimate parent was not retained and respected'.[132] The Court also first states that there is no agency

124 S. Griffin, 'Establishing a Holding Company's Duty of Care to an Employee of a Subsidiary without the Need to Lift the Corporate Veil', *Co. L.N. (Company Law Newsletter)* 2011, nr. 300, p 3.

125 *Mitchell* v. *Glasgow City Council* [2009] 1 AC 874, at 20 and 56.

126 *Akzo Nobel N.V.* v. *Competition Commission* [2013] CAT 13, at 96.

127 V. Thomas, *Rev. Proc. Coll.* 2013, pp 29 and 78.

128 His employer, the Arthur Wood Company, no longer existed and did not have in place responsive liability insurance.

129 S. Griffin, 'Duty of Care Issues in a Holding-Subsidiary Company Relationship', *Co. L.N.* 2014, (1) 3.

130 *Thompson* v. *The Renwick Group Plc* [2014] EWCA Civ 635, at 35.

131 S. Griffin, *Co. L.N.* 2014, (1) 3.

132 *Thompson* v. *The Renwick Group Plc*, at 38.

relationship between the companies, which would be a ground for piercing the corporate veil (cf. *infra* Grounds for Piercing the Corporate Veil).

In all the cases we discussed, the claimant is an employee of a subsidiary. One can, however, try to use similar arguments in cases in which the damaged parties are third parties. The case law on employees might be extended to, for instance, the local population in the host country. It is also argued that on the basis of *Chandler* v. *Cape*, (parents of) transnational companies should owe a duty of care to the employees of a supplier when there are long-term supply contracts.[133]

In the Dutch *Shell* case,[134] Nigerians claimed damages from Royal Dutch Shell Plc. and Shell Petroleum Development Company of Nigeria Ltd. for oil leakages that had damaged their property. The Dutch court dismissed the case against the mother company, Royal Dutch Shell, because even if the company owed a duty of care to the employees of the subsidiary, it cannot have owed a duty to the local population. The latter would not fulfil the proximity requirement of the three-stage test for the existence of a duty of care. The court moreover deems it not fair, just, and reasonable to impose a duty of care.[135] The case is thus distinguished from *Chandler* v. *Cape*.[136] The court justifies this by stating that a duty of care can be owed towards a relatively restricted group, namely employees, but in this case not towards an '*almost unrestricted group of people in many countries*',[137] even though Shell had expressed a general CSR commitment.[138] Although this case was tried by a Dutch court and thus has no precedent value, English courts are likely to award attention to the *Shell* case. This is even so although Nigerian law, as equated to common law, was actually applicable and not English common law.[139]

Some aspects particular to this case might, however, enable courts to distinguish the Dutch *Shell* case from other cases in which local population has suffered damage. The damage to the local population in the *Shell* case was not

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133 A. Sanger, *CLJ* 2012, pp 480–481.

134 Rechtbank 's-Gravenhage 24 Feb. 2010, *Akpan and Vereniging Milieudefensie* v. *Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd*, www.rechtspraak.nl; Rechtbank Den Haag 30 Jan. 2013, *Akpan and Vereniging Milieudefensie* v. *Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd*, www.rechtspraak.nl.

135 Rechtbank Den Haag 30 Jan. 2013, nr. 4.29.

136 *Ibid.*, nr. 4.32.

137 *Ibid.*, nr. 4.29.

138 *Ibid.*, nr. 4.33.

139 The court assimilated Nigerian law with common law. Rechtbank Den Haag 30 Jan. 2013, at 4.22. See L.F.H. Enneking, 'Zorgplichten van multinationals in Nederland', *NJB (Nederlands Juristenblad)* 2013, p 607 and www.navigator.kluwer.nl, 4.

only due to the breach of a duty of care of the daughter company[140] but largely to sabotage by third parties to which the court attaches great importance.[141] Under common law, the mother or daughter company could be regarded as multiple tortfeasors together with the saboteurs. This would make them jointly liable and enable the claimant to sue only one of them.[142] Under Nigerian law however, the oil company in principle bears no liability at all in case of sabotage.[143] So although common law was mostly applied to the case, this specific rule of Nigerian law might have heavily influenced the outcome.

The court moreover does not generally state that imposing liability on the mother company for damage to the local population would not be fair, just, and reasonable. It only states that such liability should be accepted 'much less fast' than liability towards employees.[144] The court thus seems to require extra strong evidence, which was in this case not available at all and the sabotage by third parties was important counterevidence. A case with stronger evidence and/or less interference by third parties may thus be distinguished from the Dutch *Shell* case.

3.2. Vicarious Liability

As in French and Belgian laws, a person is, in English law, vicariously liable for torts committed by his employees. If negligence on the part of the mother company cannot be proven, it is an option to try to establish its vicarious liability. There must be a relationship of employer and employee, and the tort must be committed in the course of the employment.[145] The innocence of the employer is irrelevant and the conditions for liability are interpreted broadly.[146] A mother company might be liable if a director of a subsidiary is, at the same time, employed by the mother company. A director can be a *de jure* director, a *de facto* director, or a shadow director. A *de facto* director is someone who performs management functions that are ordinarily performed by and associated with a formally appointed director.[147] According to the Companies Act 2006, a shadow director is 'a person in accordance with whose directions or instructions the

140 The court determined that the daughter company had breached a duty of care when the oil leakages arose; see Rechtbank Den Haag 30 Jan. 2013, nr. 4.38-4.46.

141 Sabotage is often committed in order to steal oil or to receive damages from oil companies for the oil pollution; see Rechtbank Den Haag 30 Jan. 2013, nr. 2.1.

142 M. Lunney & K. Oliphant, *Tort Law. Text and Materials* (3rd edn, Oxford: Oxford University Press 2008) pp 265-266.

143 Rechtbank Den Haag 30 Jan. 2013, nr. 4.18.

144 *Ibid.*, 4.29.

145 M. Dugdale *et al.*, *Clerk & Lindsell on Torts*, pp 321 and 334.

146 *Ibid.*, pp 334 and 337.

147 S. Griffin, 'Establishing the Liability of a Director of a Corporate Director: Issues Relevant to Disturbing Corporate Personality', *Comp. Law* 2013, nr. 34(5), p 136. There is no clear test to determine whether someone is a *de facto* director.

directors of the company are accustomed to act'.[148] So far, there are no cases reported on vicarious liability as a ground to establish the liability of a mother company.

3.3. *Grounds for Piercing the Corporate Veil*

In English law, the grounds for piercing the corporate veil are more clearly determined by statutes and case law than in French and Belgian law. Very few, however, seem to be relevant to hold a mother company liable towards an involuntary creditor. We have examined all potential grounds for piercing the corporate veil but will only retain the ones that might form some basis to establish liability.[149] We must be aware that the corporate veil is only pierced in rare cases in favour of voluntary creditors.[150] 'Voluntary creditors' have chosen to contract with the company and have thus knowingly and willingly become a creditor, as opposed to the 'involuntary creditors'.[151] The courts are even more reluctant to pierce on judicial grounds than on the basis of a statute and only the judicial grounds can serve involuntary creditors.[152]

One ground for piercing that might be helpful is when a *company* is used *as mere façade or sham* to hide the activities of another person.[153] It is especially interesting that piercing will be allowed 'when companies are used for the avoidance of existing liabilities'.[154] Unfortunately, it is still unclear when a company is a *mere façade.*[155] The intention to hide unlawful activities is relevant and piercing will only be possible when hiding was the common intention of all parties involved.[156] Although this piercing ground is usually applied to the benefit of contractual creditors, nothing seems to prevent applying this ground to involuntary creditors. Even if this is not accepted, this piercing ground can be

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148 Companies Act 2006, s. 251(1).

149 We have thus examined but will not discuss the following grounds for piercing the corporate veil: fraudulent and wrongful trading, abuse of company name, breach of a director's duty of care and skill and his fiduciary duties, and agency.

150 P.L. Davies & S. Worthington, *Principles of Modern Company Law* (London: Sweet & Maxwell 2012), p 223; K. Vandekerckhove, *Piercing the Corporate Veil*, p 75.

151 Employees should normally be considered as voluntary creditors, but due to the need to make a living and the power of MNEs, the choice to contract or not is often illusory.

152 *Nokes* v. *Doncaster Amalgamated Collieries* [1940] AC 1014; P.L. Davies & S. Worthington, *Principles of Modern Company Law*, p 217.

153 P.L. Davies & S. Worthington, *Principles of Modern Company Law*, p 219.

154 *Kensington International Ltd.* v. *Congo* [2005] EWHC 2684 (Comm); K. Vandekerckhove, *Piercing the Corporate Veil*, p 71.

155 *Adams* v. *Cape Industries Plc*, at 543D; P.L. Davies & S. Worthington, *Principles of Modern Company Law*, p 219.

156 *Adams* v. *Cape Industries Plc*, at 540D; C. Ho Tham, 'Piercing the Corporate Veil: Searching for Appropriate Choice of Law Rules', *LMCLQ (Lloyd's Maritime and Commercial Law Quarterly)* 2007, p (22) 33.

turned into a strong argument to allow the liability in tort of a mother company. When contractual creditors are protected against a company that was deliberately founded to hide unlawful activities, involuntary creditors should definitely be allowed to receive damages from the person behind the corporate construction.

In *Adams* v. *Cape Industries*, it was argued that the subsidiaries were a mere façade for Cape's activities. The House of Lords acknowledged this, but liability was not accepted because there was nothing illegal in Cape 'arranging its affairs'.[157] According to this case, liability would be possible when the corporate structure is used to evade '(i) limitations imposed on his conduct by law, [or] (ii) such rights of relief against him as third parties already possess'.[158] However, liability will not be incurred when the corporate structure is used to evade 'such rights of relief as third parties may in the future acquire'.[159] The exclusion of the latter might hinder the liability of the mother company towards involuntary creditors who still have to establish the debt of the subsidiary.

Three other grounds for piercing the corporate veil were advanced in *Adams* v. *Cape Industries*, but none of these were withheld as a possibility by the court. The Court of Appeal reacted to the *single economic unit* argument by emphasizing that 'there is no general principle that all companies in a group of companies are to be regarded as one'.[160] Only when the interpretation of a statutory or contractual provision is at stake, there might be a chance of success with this argument.[161] *Interests of justice* are neither a ground for piercing.[162] This notion is very vague, so even if it was accepted, it would not be clear when piercing should be allowed. *Impropriety* was, in *Adams* v. *Cape Industries*, only discussed in relation to the argument that the company was used as mere façade or sham, but it can also be seen as a potential autonomous piercing ground. Davies argues that piercing should be allowed when a company is used to carry on an unlawful activity.[163] In *VTB*, impropriety was rejected as a piercing ground.[164]

4. Competition Law

Competition law provides the most flexible and broad approach to corporate veil piercing because the authorities look at the unity of conduct on the market and

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157 *Adams* v. *Cape Industries Plc*, at 544C.

158 *Ibid.*, at 544C.

159 *Ibid.*, at 544D.

160 *Adams* v. *Cape Industries Plc*, at 532D.

161 P.L. Davies & S. Worthington, *Principles of Modern Company Law*, p 219; K. Vandekerckhove, *Piercing the Corporate Veil*, p 72.

162 *Adams* v. *Cape Industries Plc*, at 536.

163 P.L. Davies & S. Worthington, *Principles of Modern Company Law*, p 221.

164 *VTB Capital Plc* v. *Nutritek International Corpn and others*, at 128.

the formal separation between two legal entities has no importance.[165] As the victim of a competition infringement is not easy to find and will not claim damages for the insecure loss it has suffered, the EU Commission steps in to protect the consumers and other players on the market. In this way, the problems of informational asymmetries, legal costs, risk, and procedural hurdles are acknowledged.[166] As the economic unity argument also comes up in French,[167] Belgian[168] and English[169] law – although it has not (yet) been accepted – we will take a look at competition law.

For the application of Articles 101 and 102 Treaty on the Functioning of the European Union (TFEU), an undertaking is 'any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed'.[170] The corporate veil can be pierced whenever companies form a single economic unit.[171] In order to facilitate the proof that several legal entities form one single economic unit, the competition authority can rely on the following presumption: a parent company is presumed to exercise actual decisive influence over a subsidiary when the parent company holds (almost) all the capital in the subsidiary or when the parent company holds all the capital in an interposed company and the latter holds the entire capital of the subsidiary.[172] The presumption was, for instance, applied to hold the investment firm Goldman Sachs jointly liable for the infringement of competition law by producers of high-voltage power cables.[173] The presumption is rebuttable by the company because there must be a balance between reaching the goals of competition law,

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165 V. Rose & D. Bailey, *Bellamy & Child – European Union Law of Competition* (Oxford: Oxford University Press, 2013), p 94.

166 P. Hughes, *ECLR* 2014, p 70.

167 Cass. fr. (Com.) 20 Oct. 1992, *Rev. Soc.* 1993, p 449; A. Danis-Fatôme, *Apparence et contrat* (Paris: L.G.D.J. 2004), p 329; B. Grimonprez, *Rev. Soc.* 2009, nr. 17.

168 Articles 3 and 4 of the Belgian Competition Law (Law of 10 Jun. 2006) correspond to Arts 101 and 102 TFEU. It has the same interpretation of the concept 'undertaking'. See F. Tuytschaever & M. Visser, 'Commentaar bij art. 1 WBEM', 1 juli 2007, www.jura.be.

169 *Adams* v. *Cape Industries Plc*, at 532D; P. Hughes, *ECLR* 2014, p 68.

170 ECJ 10 Sep. 2009, *Akzo Nobel*, C-97/08 P, at 54.

171 ECJ 8 May 2013, *Eni SpA*, C-508/11 P, at 46. Piercing the corporate veil is not only relevant to hold the mother company liable for the subsidiary's debt but also to calculate the amount of turnover generated by the infringing undertaking and to determine the jurisdiction of national courts.

172 ECJ C-97/08 P, *Akzo Nobel*, at 60; ECJ C-508/11 P, *Eni SpA*, at 47–48. For more case laws on this matter, see M. Van der Woude *et al.*, *EU Competition Law Handbook 2013 Edition* (London: Sweet & Maxwell 2012), pp 37–40.

173 Press release of the European Commission, 'Antitrust: Commission fines producers of high voltage power cables EUR 302 million for operating a cartel', 2 Apr. 2014, http://europa.eu/rapid/press-release_IP-14-358_en.htm.

namely penalizing and prevention, and the presumption of innocence, legal certainty, and rights of the defence.[174]

The presumption does not apply when the subsidiary is not, directly or via an interposed company, wholly owned by the parent company. In that case and when the presumption is rebutted, the competition authority has to prove that the parent company has a decisive influence over the subsidiary.[175] The European Commission has, for instance, in several cases proven that a joint venture and the two companies behind it, form a single economic unit.[176] Not only the conduct of the subsidiary on the market will serve as proof but also 'the economic, organisational and legal links which unite [the] legal entities' are of particular importance.[177] There is no exhaustive list of factors that are relevant to determine the existence of a single economic unit, as all factors establishing a link between the subsidiary and the parent company matter.[178]

In competition law, it is acknowledged that there are 'limits to the externalization of risks through the use of limited liability'[179] so the European Court of Justice (ECJ) interprets the provisions in a flexible way, in favour of finding economic unity.[180] It is not required that the parent company has explicit knowledge of the underlying illegality.[181] Because of this expansive view, companies are aware of the fact that they should establish a competition policy throughout the group and make sure it is implemented.[182]

5. Conclusion

In French, Belgian, and English laws, the general tortious provisions, namely Article 1382 Civil Code and the tort of negligence, are the most important to establish the liability of the mother company. Especially in English law, the tort of negligence is being developed as to increasingly impose a duty of care on mother

174 ECJ C-508/11 P, *Eni SpA*, at 50. So far, the ECJ has never found a violation of the fundamental rights of a corporation. This induces some to argue that the presumption is, in fact, not rebuttable. See B. Leupold, 'Effective Enforcement of EU Competition Law Gone Too Far? Recent Case Law on the Presumption of Parental Liability', *ECLR* 2013, nr. 34(11), pp 571 and 578; M. Olaerts & C. Caufmann, 'Quimica: Further Developing the Rules on Parent Company Liability', *ECLR* 2011, nr. 32(9), p 439.

175 ECJ 26 Sep. 2013, *Alliance One International Inc.*, C-679/11 P, at 40; ECJ 26 Sep. 2013, *The Dow Chemical Company*, C-179/12 P, at 56; B. Leupold, *ECLR* 2013, nr. 34(11), p 571.

176 ECJ C-179/12 P, *The Dow Chemical Company*, at 58; ECJ 26 Sep. 2013, *EI du Pont de Nemours and Company*, C-172/12 P, at 47.

177 ECJ C-97/08 P, *Akzo Nobel*, at 73–74; ECJ C-508/11 P, *Eni SpA*, at 46; ECJ C-179/12 P, *The Dow Chemical Company*, at 52.

178 ECJ C-97/08 P, *Akzo Nobel*, at 74; ECJ C-179/12 P, *The Dow Chemical Company*, at 54.

179 P. Hughes, *ECLR* 2014, p 76.

180 B. Leupold, *ECLR* 2013, nr. 34(11), p 573.

181 P. Hughes, *ECLR* 2014, p 69.

182 *Ibid.,* p 68; M. Olaerts & C. Caufmann, *ECLR* 2011, nr. 32(9), p 439.

companies. This evolution will also be helpful to direct defendant companies to a settlement, as has been done in a number of corporate social responsibility cases.[183] Another possibility to hold the mother company directly liable is vicarious liability. When a director of a subsidiary is, at the same time, employed by the mother company, the mother company will be liable for the acts of its employee. In French law, there might be a general vicarious liability at hand of a mother company for its subsidiaries as suggested in the *projet Catala.* There definitely is a promising trend to hold mother companies liable in French environmental law.[184]

The liability of the mother company can also be put at stake by establishing the debt of the subsidiary and finding a way to hold the mother company liable for this debt. We have referred to this as 'indirect liability'. The law is very shattered on ways in which involuntary creditors can hold the mother company liable for the subsidiary's debt. In French and Belgian laws, this is possible by proving abuse of right, fraud, concealment, or the creation of false appearances, which are all based on similar indications. Because of the unsettled nature of the law, there is an important possibility to guide the judge. In a case of 1994 for instance, the Belgian judge relied on concealment, abuse of right, and the adage *fraus omnia corrumpit* all at the same time in order to allow the piercing of the corporate veil.[185] English company law has established several grounds to pierce the corporate veil, but few seem fit to apply to involuntary creditors. Only when the subsidiary is used as a mere façade or sham, veil piercing seems possible. We must say that in English, Belgian, and French laws alike, it is not likely that the corporate veil will be pierced when we deal with an MNE that has a good-working administration and an at least theoretically clear division between the different legal persons. Establishing the liability of the mother company itself, without using the subsidiary as an intermediary, yields therefore more chances.

It is only in competition law that the conduct on the market as a single economic unit generally prevails over the legal separation between companies. In insolvency law, another law that is often concerned with veil piercing issues, it is much more difficult to extend the insolvency proceedings to the mother company.[186] This shows that regard must be had to the particular situation of involuntary creditors, such as the victims of a competition law infringement.

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183 A settlement was reached in *Lubbe* v. *Cape Plc*, 2000 WL 976033, in *Ngcobo* v. *Thor Chemicals Holdings Ltd.*, 1995 WL 1082070 and in the similar case *Sithole* v. *Thor Chemicals Holdings Ltd.* [1999] TLR 110. See C. Buggenhoudt & S. Colmant, *Justice in a Globalised Economy: A Challenge for Lawyers – Corporate Responsibility and Accountability in European Courts* (March 2011), http://www.asf.be/blog/publications/gandj_craeuropeancourts/.

184 According to Art. L512-17 of the environmental code (*loi Grenelle II*), the mother company is liable for environmental damage when the subsidiary is undercapitalized.

185 Court of Appeal Antwerp 1 Feb. 1994, *TRV* 1996, 64.

186 See, e.g., ECJ 15 Dec. 2011, *Rastelli Davide*, C-191/10.

Insolvency proceedings, on the contrary, typically involve more voluntary than involuntary creditors. This difference also makes sense if we look at the consequences of piercing the corporate veil in both situations. When the corporate veil is pierced in competition law, the economic unit is only liable for the imposed fine and possibly for the tort liability that is incurred. This is comparable to liability in tort for a certain act, towards certain victims. In insolvency law, however, piercing the corporate veil has more drastic consequences, as all contractual creditors will claim payment from the mother company.[187] Considering the consequences and the position of the creditors, it is obvious that the law should differentiate between veil piercing by voluntary creditors and by involuntary creditors. National laws should follow the example and differentiate between liability of a mother company towards contractual creditors in insolvency proceedings and liability towards employees and the local population of the host country of a subsidiary.

The corporate social responsibility cases we have discussed reveal the potential of private law for the protection of victims against the practices of MNEs. This can bring the discussion on the 'social mission' of these law domains to the surface,[188] while we see that an evolution to more protection is already taking place. The analysis has shown that the elements for better protection are there. It will be interesting to see whether courts manage to differentiate properly between the involuntary creditors of MNEs, possibly victims of human rights violations, and the voluntary contractual creditors for whom more stringent rules can apply.

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187 B. Grimonprez, *Rev. Soc.* 2009, nr. 9.

188 U. Baxi, 'Mass Torts, Multinational Enterprise Liability and Private International Law', *Rec.Cours (Académie de Droit International. Recueil des cours)* 1999, nr. 276, p 319.

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EUROPEAN REVIEW OF PRIVATE LAW
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EUROPÄISCHE ZEITSCHRIFT FÜR PRIVATRECHT

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